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ABSTRACT

Causes for the dismissal of teachers, which have traditionally been judged to be within the discretionary power of school boards, have been closely scrutinized in recent court decisions. The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution has been interpreted in recent litigation concerning faculty hiring, evaluation, and dismissal, such that "tests" used for those purposes cannot be arbitrary, capricious, or unreasonable. The purpose of this paper is to examine recent changes in state statutes and trends in judicial decisions under the framework of this interpretation of the Due Process Clause. In addition to a presentation of legislative acts and judicial rulings, guidelines for the evaluation and dismissal of professional staff are discussed. (Author/MLF)

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EVALUATION AND DISMISSAL OF PROFESSIONAL STAFF: AN EXAMINATION OF RECENT LITIGATION AND LEGISLATIVE ACTION

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EVALUATION AND DISMISSAL OF PROFESSIONAL STAFF:

AN EXAMINATION OF RECENT LITIGATION AND LEGISLATIVE ACTION

Causes for the dismissal of teachers which have traditionally been judged to be within the discretionary power of school boards have been closely scrutinized in recent court decisions. The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution has been interpreted in recent litigation concerning faculty hiring, evaluation, and dismissal, such that "tests" used for those purposes cannot be arbitrary, capricious or unreasonable.

It is the purpose of this paper to examine recent changes in state statutes and trends in judicial decisions under the framework of this interpretation of the Due Process Clause. In addition to a presentation of legislative acts and judicial rulings, guidelines for the evaluation and dismissal of professional staff will be discussed.

EVALUATION OF PROFESSIONAL STAFF

The primary reasons for evaluating teacher performance are to provide feedback to the teacher and supervisor in order to improve the instructional process, to screen those teachers who receive greater responsibilities or merit pay, and to aid in making decisions concerning retention (or dismissal) and tenure. Evaluation of teachers in the past placed an emphasis on the rating of personal traits and qualities deemed to be necessary for successful teaching. The lack of correlation between such traits and actual performance led to the rating of descriptive statements of behaviors which were

thought to be closely related to student achievement. Although such rating sheets are still employed by the majority of school districts, recent changes in the appraisal of teaching performance attempt to evaluate the attainment of pre-established job standards or "position expectancies." Such trends in teacher evaluation are in part due to recent court decisions and state statutes calling for teaching performance evaluation to be "job related."

Several states have enacted recent legislation to alter procedures for pre-service teacher certification and/or in-service teacher evaluation. The Stull Act[1], for example, called for California school districts to "establish a uniform system of evaluation and assessment of the performance of certificated personnel." The guidelines for evaluation were to be "objective" and based upon "...standards of expected student progress."

Title VII of the Civil Rights Act of 1964 prohibited discrimination in employment on the basis of race, religion, national origin, or sex. Amended in 1972 by the Equal Employment Opportunity Act in order to place public employees within its purview, this legislation required that tests used for employment or performance evaluation be shown to measure what they purport to measure. In addition, it has been ruled that such "tests" of teaching performance can include both formal written evaluations and the accumulated data from a teacher's professional file.

It was ruled in Baker v. Columbus Municipal Separate School District (1971) that if tests had little or no relationship to the job in question, then use is a violation of the Due Process Clause of the Fourteenth Amendment. The majority stated that "...an administrator runs great risks of arbitrary and unreasonable results in the absence of information which relates academic qualities to teaching success in his district."[2] The District Court's holding relied upon the 1957 Supreme Court's ruling in Schware v.

Board of Examiners that "...any qualification must have a rational connection with the applicant's fitness or capacity"[3] to perform his occupation or profession.

The Supreme Court addressed this issue in Griggs v. Duke Power Co. (1971), holding that employment tests and measurement procedures must be "...a reasonable measure of job performance" under the Civil Rights Act of 1964, and that "...tests used must measure the person for the job and not the person in the abstract."[3] In a similar case, scores on rating sheets were used as the basis for dismissing black teachers under a court-ordered desegregation plan in Texas.[5] The court held in favor of the teachers, since the rating standards were "...patently subjective in form and obviously susceptible to completely subjective treatment.' The court implied that assessment techniques and standards can and must be objective.[6]

A Federal Court of Appeals held that examinations for supervisory positions in New York City Schools were discriminatory in effect, as they lacked either content or predictive validity.[7] Content validation, according to the court, requires examiners to demonstrate that they have formulated questions and procedures based on an analysis of the job's requirements; whereas predictive validation requires a showing that there is a correlation between a candidate's performance on the test and his actual job performance.

The Fourth Circuit Court of Appeals[8] held in 1974 that the use of a score of 500 on the National Teachers Examination to eliminate more black than white teachers was arbitrary and discriminatory. Moreover, the test was found to have no "predictive validity"; the court stated that "...any connection between the examination and effective teaching is purely coincidental."

GUIDELINES FOR TEACHER EVALUATION

Rating sheets and other instruments used in the evaluation of teachers must comply with state and federal constitutional requirements, particularly with due process and equal protection guarantees of the Fourteenth Amendment. To be compatible with due process rights, a test must not be arbitrary, capricious or unreasonable. To be consistent with equal protection, a test must not discriminate on the basis of race, religion, national origin, or sex.[9] It is apparent from the cited legislation and judicial decisions that the trend in the future will be for such tests to be related to job expectations and actual job performance.

Redfern states that the right to evaluate is the prerogative of the board and school administration; however, "...to be fully involved in evaluation activities is a right which should be guaranteed staff members, by negotiation if necessary."[10] Evaluation procedures are increasingly becoming part of negotiated contracts between teacher associations and school boards. Contract provisions generally contain such stipulations as the number of observations to be conducted and by whom teachers are to be observed, as well as purposes for which evaluations are conducted and procedures for post-observation conferences and for placing reports in teachers' files.

Although informal peer-observations might be beneficial to the improvement of instruction through exchanges of ideas on teaching methods, the formalization of peer-observations does not appear to be an effective method of teacher evaluation for administrative purposes. Formal, written obser-

vations and evaluations should be conducted by immediate supervisors, once job expectations and individual goals have been discussed. Observations should be conducted openly, and should be followed by a conference as soon as possible to provide both the supervisor and teacher an opportunity to discuss strengths and weaknesses, to clarify misunderstandings, and to develop appropriate strategies for improvement and/or attainment of long-term goals.

Teacher evaluation generally includes the assessment of performance in many settings other than the classroom. Herman suggests that it is appropriate to "...include the evaluation of an employee in any setting where he represents the school district and where his performance is considered important to the quality of his overall job performance."[11] In order to avoid the subjective nature of such observations and the danger of misinformation in such situations, the administrator should discuss incidents openly with the teacher prior to including a written statement in his/her file.

DISMISSAL OF PROFESSIONAL STAFF

Procedures for dismissal of both probationary and tenured teachers has come under litigation in recent years. Although teachers are protected under tenure laws in most states, school boards have the right and power to dismiss teachers for "just cause," provided that due process procedures are followed for tenured teachers. Restrictions in tenure laws are not to be viewed as obstructions to the removal of a teacher for proper cause; however, the power to dismiss is a discretionary power which must not be exercised in an arbitrary manner.

Removal for reasons not authorized by statute or local contract and outside the discretionary power of the school board, has generally not been upheld by the courts, unless the statute provides that dismissal may be for any other "good or just cause." The purpose of this section is to present recent cases which outline procedures necessary for the dismissal of tenured and probationary teachers and which have helped define the phrase "good and just cause."

Following the recognition by the Supreme Court[12] that teachers acquire property rights in their positions and thus cannot be dismissed without due process, many state legislatures established procedural rights for tenured teachers. A probationary teacher does not generally have rights to notice and a hearing, unless the board attempts dismissal during the school year, or if there is an indication of a denial of basic constitutional rights.

Dismissal For "Immoral" Acts Outside The School

Incidents which occur outside the classroom may be grounds for dismissal

depending upon the circumstances. It has recently been held that personal and private conduct which does not affect the ability to teach does not necessarily prove "just cause." However, if the personal conduct becomes public through the teacher's indiscretion or if it directly involves students, then the courts have ruled the conduct to be cause for dismissal.

A homosexual teacher who attempted to pick-up an off-duty police officer on a public beach was dismissed and subsequently had his teaching certificate revoked.[13] Similarly, a teacher was dismissed and had his certificate removed for admitting to engaging in homosexual relations once within his apartment.[14] A lower California court ruled against the first teacher because the incident became public through the teacher's actions; however, the California Supreme Court decided in favor of the second teacher since the incident remained private and did not affect students or his ability to teach. The court in the latter case placed the burden of justification on the board, stating that an individual can be removed only upon a showing that his retention in the profession poses a significant danger of harm to students, school employees, or others who might be affected by his actions as a teacher.

A tenured guidance counselor who had been dismissed for spending a night with an eighteen year-old former female student was reinstated by a court which determined that there had been no interference with his responsibilities to his students.[15] However, the court pointed out that a "...different case would be presented if the specifications indicated an abuse of the teacher-pupil relationship" or if there was interference with his ability to teach.

In the past, a single teacher's pregnancy was justification for dismissal on the grounds of immorality. More recently, two single mothers were dismissed under a district policy which barred unwed mothers from being hired as teachers' aides. The policy was declared unconstitutional under both due process and equal protection guarantees since it presumed that all cases of

unwed mothers involved "irredeemable immorality."[16]

Similarly, a tenured teacher who was married one month and was eight and one-half months pregnant at the time she took a leave of absence, was dismissed for immorality.[17] The Illinois Court of Appeals upheld the teacher after finding that there was no harm done to the students, faculty or school; that no parents or students had complained; and that there was no breakdown in her relationships with other teachers or in her teaching ability. Recently in Taos, New Mexico, an unwed teacher was dismissed because of pregnancy. The Anglo teacher was reinstated after the court determined that there was a violation of equal protection guarantees, since five other unwed, pregnant teachers, all Chicano, had been retained previously.

"Immoral" acts are not limited to those involving sex. The dismissal of a teaching principal, for example, was upheld for her public testamony of smoking marijuana almost daily for twenty years.[18] The court ruled that she had "...intentionally and knowingly violated the law, because she does not personally agree with that law, and then publicly declared that fact in such a way that it would reach and affect her pupils."

In summary, incidents which occur outside of the classroom may be grounds for dismissal if relationships with students or other faculty are impaired, if the acts become public through the teacher's indiscretion and cause a furor in the community, or if the effectiveness of the teacher in the classroom is diminished.

Dismissal For Public Criticism Of The Board

It appears from recent rulings concerning First Amendment rights of teachers that a school board cannot completely restrict criticism of its

actions. The Supreme Court reversed the dismissal of a teacher who had written a letter to the editor of the local newspaper, criticizing the use of school finances.[19] Since teachers are community members who are not likely to have informed and definite opinions as to how funds should be spent, the court reasoned that "...it is essential that they be able to speak out freely on such questions without fear or retaliatory dismissal..."

In a similar case, the Supreme Court of Alaska upheld the dismissal of two teachers who had published an open letter critical of the school board.[20] Fischer and Schimmel contrast this case with the previous one, stating that several of the teachers' statements in this case concerned their immediate supervisor, false statements were not about matters of public record that could easily be corrected by the board, and the letter led to intense public controversy which lasted for more than a year.

A U.S. Court of Appeals affirmed a lower court ruling against a non-tenured librarian who had not been rehired on the grounds that she had insulted another teacher in the presence of students, for shoving the superintendent, and for threatening physical harm to administrative officials.[21] The court held that her First Amendment freedoms had not been violated by the board. In a similar case, the Appellate Division of the Superior Court of New Jersey upheld the dismissal of the president of the local Education Association, after she had verbally attacked the superintendent and school board members in a speech to newly hired teachers in an orientation held by the school administration.[22]

The U.S. Supreme Court further clarified First Amendment Rights of teachers in its recent ruling in Mt. Healthy City School District v. Doyle (1977). During his probationary period, Doyle had been involved in an altercation with another teacher, an argument with school cafeteria employees,

and incidents in which he had sworn at students and made obscene gestures to girl students. The school board decided not to rehire him following his making an inaccurate report to a local radio station concerning the adoption of a dress code for professionals. The superintendent responded to Doyle's demand for an explanation that the decision was based on his "lack of tact in handling professional matters," citing the obscene gestures used to correct students and the inaccurate report to the radio station. The Supreme Court reversed the holding by both the U.S. District Court and Sixth Circuit Court of Appeals that the board had violated the teachers First and Fourteenth Amendment rights.[23] Although the board must provide a hearing for non-tenured teachers when the cause for dismissal involves constitutionally protected rights, the court ruled that (1) the burden is on the teacher to show that the free speech activity was a "substantial" or "motivating" factor in the board's decision, and if so, then (2) the burden shifts to the board to show that there was sufficient cause for dismissal based on other incidents.[24] In other words, the board must be prepared to prove that the teacher's "record was such that he would not have been rehired in any event."

Dismissal For Incidents In The Classroom

Academic freedom enables teachers to evaluate and criticize beliefs and values of the past and present. The right to freely select teaching methods and materials must, however, be balanced by the interests of society.

An Alabama court (1970) upheld the right of a teacher to use a story by Kurt Vonnegut in an eleventh grade English class.[25] Relying upon the

Tinker[26] standard, the court concluded that the use of the book was appropriate for eleventh graders and did not "materially and substantially interfere with reasonable requirements of discipline in the school."

The use of an article containing obscene language in a senior English class was upheld since the article was introduced for educational purposes at an appropriate level of high school.[27] In a case with similar circumstances, the dismissal of a non-tenured teacher was upheld by a California Court of Appeals, which ruled that the use of a teacher-written story containing vulgarity in a tenth grade class was justifiable cause for removal.[28]

A trial court upheld the dismissal of a non-tenured junior high school teacher who had reproduced student-made materials which contained references to sexual organs and the sexual act. A California Court of Appeals, however, reversed the lower court ruling, finding that there was no disruption of discipline or the teaching process and that her retention posed no danger of harm to students or school employees.[29]

In a similar case, three non-tenured elementary teachers were terminated for distributing a poem which referred to apparent joys of smoking marijuana and which invited children to throw off discipline imposed on them by the moral environment of their homelife. The U.S. Court of Appeals held that there was good cause for dismissal which did not violate the teachers' First Amendment or civil rights.[30]

It appears that incidents occurring in the classroom may, or may not, be grounds for dismissal, depending upon such circumstances as the relevance of the book or language used to the subject being taught, the teacher's methods and purposes, the age and maturity of students, and the resulting effect on the students.

Huggins[31] summarized recent litigation in teacher dismissal cases in his "ten commandments you better not break." DON'T FIRE A TEACHER: who has been arrested for possessing marijuana unless you have proof he can no longer function effectively in the classroom; whose discussion of religion stirs up a local furor unless he is advancing or inhibiting a particular faith; for incompetency on the basis of poor student test scores alone; solely for being a homosexual unless his sexual inclination adversely affects teaching performances; for criticizing the school administration unless he is using the classroom to advance his own gain or to promote a special interest; for insubordination unless school regulations are clearly stated or reasonably understood; for using too much creative freedom unless your restrictions were stated clearly and specifically beforehand; without first knowing the nitty-gritty of tenure; for refusing to salute the flag; or who brings alcohol into the school unless you can prove "just cause."

GUIDELINES FOR TEACHER DISMISSAL

The purpose of tenure statutes was stated in 1939 as "...to insure an efficient permanent staff of teachers whose members are not dependent on caprice for their positions as long as they conduct themselves properly and perform their duties efficiently and well."[32] Interpretations of procedures for the removal of teachers who do not conform to such stipulations of tenure statutes have come under intense litigation in recent years. The due process clause of the Fourteenth Amendment has been interpreted to mean that both a notice of charges and a hearing are necessary in all cases involving tenured faculty members. In addition, recent cases indicate that non-tenured staff members must also be provided a hearing if it is shown that grounds for dismissal involve basic constitutional rights or violate provisions of a negotiated contract.

Trends in recent court decisions indicate that "immoral" incidents occurring outside the classroom are not necessarily grounds for dismissal. There is a tendency to link immorality with "unfitness to teach"; dismissal is likely to be upheld if such acts diminish the teacher's effectiveness in the classroom, impair relationships with students or staff, affect the standing of the school as an educational institution, and create a furor in the community.[33]

In addition, a school board cannot deny First Amendment guarantees of free speech when teachers publicly criticize its actions, unless the board can show a compelling need for confidentiality or that such criticism will

adversely affect the working relationship between the teacher and school authorities. Furthermore, First Amendment rights in cases involving academic freedom in the classroom have been judged in relation to the educational purposes to be achieved through the questioned methods or materials used, and in relation to the age of students and resulting effects on the students.

It is the responsibility of an administrator to actively supervise, to constructively evaluate, and to assist teachers in realizing their potential. Redfern states that the primary purpose of evaluation is to improve performance; however, he continues to point out that "...when the evidence clearly indicates that the improvement is not taking place and the prognosis is negative, well-documented evaluative data become indispensible."[34]

The importance of a well-prepared and well-documented case based upon justifiable causes for dismissal has been underscored heavily in recent decisions. Administrators should establish criteria for effective teaching performance well in advance, and should note deficiencies in writing. Teachers should be aware of and should be provided both time and supervisory guidance to overcome such deficiencies. Accurate, up-to-date anecdotal records must be kept to show a chronology of events leading up to a dismissal recommendation.

When an administrator is contemplating making a recommendation to deny tenure or to dismiss a tenured teacher, he should give as much notice as possible and the specific reasons for such a recommendation. The burden is then upon the teacher to improve his teaching performance or to demonstrate that such reasons for dismissal violate basic constitutional guarantees or provisions of a negotiated contract, rather than falling within the relm of "just cause".

REFERENCES

1 West's Annotated California Codes, Education Code Sections 13485 and 13487, effective Sept. 1, 1972.

2 329 F. Supp. 706, N.D. Miss., 1971.

3 353 U.S. 232, 1957.

4 401 U.S. 424, quote at 436, 1971.

5 U.S. v. Texas Education Agency, 459 F. 2d 600, 5th Cir., 1972.

6 Tractenberg, Paul L. "Legal Issues in the Testing of School Personnel" Phi Delta Kappan 57(May 1976):602-605.

7 Chance v. Board of Examiners, 458 F. 2d 1167, 2nd Cir., 1972.

8 Walston v. County School Board of Nansemond County, Virginia, 492 F. 2d 919, 4th Cir., 1974.

9 Tractenberg, op.cit., p. 602.

10 Redfern, George. "Teacher Evaluation: The Big Picture" Colorado Journal of Educational Research 14(Spring 1975): 8-12.

11 Herman, Jerry J. "Developing a Staff Evaluation Program" NASSP Bulletin 60(September 1976): 8-14.

12 Perry v. Sindermann, 408 U.S. 593, 1972.

13 Sarac v. State Board of Education, 57 Cal. Reptr. 69, 1967.

14 Morrison v. State Board of Education, 82 Cal. Rptr. 175, 1969.

15 Goldin v. Board of Education of Central School District #1, 359 N.Y.S. 2d 384, 1973.

16 Andrews v. Drew Municipal Separate School District, 507 F. 2d 611, 5th Cir., 1975.

17 Reinhardt v. Bd of Educ., 311 N.E. 2d 710, A.C. Illinois, 1974.

18 Governing Board v. Brennan, 18 C.A. 3d 396, 1971.

19 Pickering v. Board of Education, 391 U.S. 563, 1968.

20 Watts v. Seward School Board, 454 P. 2d 732, 1969.

21 Amburgey v. Cassady, 507 F. 2d 728, 6th Cir., 1974.

22 Pietrunti v. Board of Education of Brick Township, 319 A. 2d 262, 1974.

23 429 U.S. 274, 1977.

24 Flygare, Thomas J. "Supreme Court Clarifies First Amendment Rights of Teachers" Phi Delta Kappan 58(April 1977): 645-646.

25 Parducci v. Rutland, 316 F. Supp. 352, 1970.

26 Tinker v. DesMoines Indep. Sch. Dist., 393 U.S. 503, 1969.

27 Keefe v. Geanakos, 418 F. 2d 359, 1st Cir., 1969.

28 Lindros v. Governing Board of Torance School District, 26 C.A. 3d 38, 1972.

29 Oakland Unified School District v. Olicker, 102 Cal. Rptr. 421, 1972.

30 Brubaker v. Board of Education, 502 F. 2d 973, 7th Cir., 1974.

31 Hudgins, H. C. "The Law and Teacher Dismissals" Nation's Schools (March 1974): 40-43

32 Fresno City High School District v. DeCaristo, 92 P.2d 668, 1939.

33 Francis, Samuel N. and Charles E. Stacey, "Law and the Sensual Teacher" Phi Delta Kappan 59(October 1977): 98-102.

34 Redfern, op.cit.